INTERIOR BOARD OF INDIAN APPEALS

Village of Ruidoso, New Mexico v. Albuquerque Area Director,
Bureau of Indian Affairs

32 IBIA 130 (04/14/1998)

Related Board cases:
31 IBIA 143
34 IBIA 242

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

VILLAGE OF RUIDOSO, NEW MEXICO
v.
ALBUQUERQUE AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 96-103-A Decided April 14, 1998

Appeal from a decision to take a tract of land into trust for the Mescalero Apache Tribe.

Vacated and remanded.

1. Indians: Lands: Trust Acquisitions

In analyzing a request for trust acquisition under 25 C.F.R. § 151.10(c), the Bureau of Indian Affairs must take into consideration all facts known to the Bureau, or which should be known to the Bureau, which relate to the purpose for which the property proposed for trust acquisition is to be used. The Bureau's consideration of these facts must be reflected in the decision to grant or deny the request for trust acquisition.

APPEARANCES: John Underwood, Esq., and Charles Rennick, Esq, Ruidoso, New Mexico, for Appellant; Mary Jane Sheppard, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., and Ethel Abeita, Esq., Office of the Regional Solicitor, Albuquerque, New Mexico, for the Assistant Secretary - Indian Affairs and the Area Director.

OPINION BY ADMINISTRATIVE JUDGE VOGT

This is an appeal from a June 18, 1996, decision of the Albuquerque Area Director, Bureau of Indian Affairs (Area Director; BIA), to take a 7.436-acre tract into trust for the Mescalero Apache Tribe (Tribe), subject to receipt of a satisfactory title examination.

For the reasons discussed below, the Board vacates the Area Director's decision and remands this matter to him for further consideration.

Background

On September 12, 1997, the Board referred this appeal to the Assistant Secretary - Indian Affairs with a request that she choose from a number of options concerning the review of BIA trust acquisition decisions and the Board's role in that review. 31 IBIA 143. On January 13, 1998, the Board

received a response from the Assistant Secretary, 1/ "request[ing] that the Board proceed to review the case at hand as well as the other pending appeals of land acquisition decisions using the McAlpine [2/] approach." Assistant Secretary's Response at 4.

Upon receipt of the Assistant Secretary's response, the Board gave the parties an opportunity to make any further statements or arguments they believed necessary. No statements or arguments on the merits of the matter were received and, on March 2, 1998, the Board declared the case fully submitted. 3/

Discussion and Conclusions

As discussed in its earlier decision, 31 IBIA at 154, the Board believes that the standard of review employed in McAlpine is similar to its own established standard of review in trust acquisition cases. Accordingly, the Board construes the Assistant Secretary's response to the Board's referral as requesting the Board to continue to review trust acquisition decisions in general accord with the manner in which it has reviewed such decisions in the past.

1/ The response notes at page 1 n.1: "On November 11, 1997, Kevin Gover became the Assistant Secretary - Indian Affairs, replacing Ada E. Deer."

Because the brief of the Assistant Secretary on the merits of this matter was filed on behalf of then-Assistant Secretary Deer, the Board uses the pronoun "she" in this decision in referring to the Assistant Secretary.

2/ McAlpine v. United States, 112 F.3d 1429 (10th Cir. 1997).

3/ The Board's order called for simultaneous statements from the parties. The Assistant Secretary asked to be given an opportunity to respond to any statement made by Appellant. Appellant moved to disqualify the Assistant Secretary and attorney Mary Jane Sheppard from any further proceedings in this matter. Appellant alleged that both had a conflict of interest)) on the apparent theory that, in responding to the Board's Sept. 12, 1997, referral, the Assistant Secretary acted in a decision-making capacity and was therefore disqualified from participating further in this appeal as an advocate.

In the absence of a need for any further proceedings, the Board found in its Mar. 2, 1998, order that both the Assistant Secretary's request and Appellant's motion were moot.

Appellant filed a motion to reconsider the Mar. 2, 1998, order, again seeking to disqualify the Assistant Secretary and Ms. Sheppard.

Appellant has failed to identify any further proceedings to which the requested disqualification would apply if it were to be granted. Accordingly, Appellant has failed to show any reason why its request is not moot.

Appellant's motion to reconsider is denied.

Appellant has argued throughout this appeal that the Board's standard of review remains the same as it has always been. See 31 IBIA at 145, Opening Brief at 3-7; Reply Brief at 1-8, Amended Reply Brief at 1-4. It appears therefore that the parties are now in agreement as to the proper standard of review in this case.

The Board proceeds to review the Area Director's June 18, 1996, decision under the McAlpine-Board standard, pausing first to review the facts of this case as set out in the earlier decision:

> The tract at issue is located within the boundaries of the Village of Ruidoso and contains a lodge, formerly known as the Carrizo Lodge and now known as the Mescalero Inn. It is contiguous to the Mescalero Apache Reservation. In 1995, the tract was given to the Tribe by Gaim Ko, Inc., a New Mexico corporation. By Tribal Resolution No. 95-61, dated August 15, 1995, the Tribe accepted the gift and requested the Area Director to take the property into trust. */ The deed from Gaim Ko, Inc., to the Tribe was executed on November 21, 1995. By Tribal Resolution No. 96-03, dated January 5, 1996, the Tribe authorized its President to proceed with the trust acquisition request.
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> On March 22, 1996, the Acting Superintendent, Mescalero Agency, wrote to Appellant, as well as the Governor of New Mexico and the Assessor of Lincoln County, New Mexico, informing them that the Tribe's trust acquisition request was being considered and inviting their comments. Appellant submitted extensive comments and requested that the Tribe's request be denied. Lincoln County also opposed trust acquisition. The Governor stated that the State opposed trust acquisition if the property was to be used for gaming purposes and asked that the Tribe's request be denied until appropriate information was provided.
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> On May 21, 1996, the Acting Superintendent submitted the Tribe's acquisition request to the Area Director, analyzing it under the criteria in 25 C.F.R. § 151.10 and recommending approval. On June 18, 1996, the Area Director issued the decision on appeal here. In a memorandum of that date addressed to the Superintendent, he included his analysis of the factors in section 151.10 and a discussion of the concerns expressed by the commenters. By letters of the same date, he notified Appellant and others of his decision.
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> */ This resolution was deemed by BIA to satisfy the requirement of 25 C.F.R. § 151.9 for a "written request for approval" of a trust acquisition. See Area Director's Sept. 26, 1995, memorandum to Superintendent, Mescalero Agency.

31 IBIA at 144.

Appellant first contends that the Area Director erred in concluding that there is statutory authority for the acquisition. 4/ It argues that the statutory provision cited by the Area Director, 25 U.S.C. § 465, is unconstitutional, as was held by the United States Court of Appeals for the Eighth Circuit in South Dakota v. United States Department of the Interior, 69 F.3d 878 (8th Cir. 1996). Acknowledging that the court of appeals' decision has been vacated by the Supreme Court, 117 S. Ct. 286 (1996), Appellant nevertheless urges the Board to adopt the view of the court of appeals that the provision is unconstitutional.

As it has stated on a number of occasions, the Board has no authority to declare an act of Congress unconstitutional. E.g., Estate of Annie Greencrow Whitehorse, 27 IBIA 136 (1995); Murdock v. Acting Phoenix Area Director, 22 IBIA 130 (1992). Accordingly, the Board lacks jurisdiction to address Appellant's contention that 25 U.S.C. § 465 is unconstitutional.

Appellant also contends that statutory trust acquisition authority is lacking here because of the provision in 25 U.S.C. § 211 that "[n]o Indian reservation shall be created, nor shall any additions be made to one heretofore created, within the limits of the States of New Mexico and Arizona,

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4/ The existence of statutory authority for a trust acquisition is the first of several criteria which must be considered by BIA in evaluating requests for such acquisitions. As relevant to this appeal, 25 U.S.C. § 151.10 provides:

"The Secretary will consider the following criteria in evaluating requests for the acquisition of land in trust status when the land is located within or contiguous to an Indian reservation, and the acquisition is not mandated:

"(a) The existence of statutory authority for the acquisition and any limitations contained in such authority;

"(b) The need of the individual Indian or the tribe for additional land;

"(c) The purposes for which the land will be used;

"(d) If the land is to be acquired for an individual Indian, the amount of trust or restricted land already owned by or for that individual and the degree to which he needs assistance in handling his affairs;

"(e) If the land to be acquired is in unrestricted fee status, the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls;

"(f) Jurisdictional problems and potential conflicts of land use which may arise; and

"(g) If the land to be acquired is in fee status, whether the Bureau of Indian Affairs is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status.

"(h) The extent to which the applicant has provided information that allows the Secretary to comply with 516 DM 6, Appendix 4, National Environmental Policy Act Revised Implementing Procedures, and 602 DM 2, Land Acquisitions: Hazardous Substances Determinations."

except by Act of Congress." Appellant cites Masayesva v. Zah, 792 F. Supp. 1165, 1171 (D. Ariz. 1992), and Healing v. Jones, 210 F. Supp. 125, 179-81 (D. Ariz. 1962), for the proposition that this statutory provision, enacted in 1918, is still in effect and therefore applicable to the present trust acquisition request. The Assistant Secretary 5/ counters with Jicarilla Apache Tribe v. New Mexico, 742 F. Supp. 1487 (D.N.M. 1990), in which it was explicitly held that neither trust acquisitions under 25 U.S.C. § 465 nor proclamations of reservation status under 25 U.S.C. § 467 are prohibited by 25 U.S.C. § 211.

Appellant suggests that there is a "conflict between federal district courts over the proper interpretation of 25 U.S.C. § 211." Reply Brief at 9. In fact, there is no real conflict because neither of the cases cited by Appellant deals with the relation between section 211 and the Indian Reorganization Act of 1934, from which both sections 465 and 467 derive. Jicarilla Apache Tribe is the only one of the three cited cases which is directly on point here, and it is contrary to Appellant's position. In any event, even if there were a conflict between the Federal district court in Arizona, whose decisions Appellant cites, and the Federal district court in New Mexico, whose decision the Assistant Secretary cites, the decision of the New Mexico district court would prevail here because the land at issue is located in New Mexico.

Accordingly, the Board rejects Appellant's contention that this trust acquisition is prohibited under 25 U.S.C. § 211.

Appellant next contends that the Area Director's decision was made in violation of a May 20, 1994, memorandum issued by the Assistant Secretary and the attached "Guidelines to Govern Part 151 of Title 25, Land Acquisitions, as It Pertains to Acquisition of Off-Reservation Fee-to-Trust Lands" (Guidelines).

The Assistant Secretary contends that the Guidelines are inapplicable here. Because this acquisition involves contiguous lands, she contends, it is subject only to the present version of 25 C.F.R. § 151.10, which was published on June 23, 1995, 60 Fed. Reg. 32,879, and which applies to land "located within or contiguous to an Indian reservation."

The Assistant Secretary's May 20, 1994, memorandum stated that the Guidelines would "remain in effect until the promulgation of new regulations for off-reservation acquisitions." A new regulation governing off-reservation acquisitions, i.e., the present 25 C.F.R. § 151.11, was promulgated at the same time as the revised version of section 151.10))on June 23, 1995, 60 Fed. Reg. 32,879. Thus, by the terms of the May 20, 1994, memorandum, the Guidelines would appear to have expired prior to the Area Director's decision in this case.

5/ As noted in the earlier decision in this case, the Assistant Secretary and the Area Director filed a joint brief, which the Board has referred to as the Assistant Secretary's brief. 31 IBIA at 145 and n.3.

Presumably, however, if the Guidelines had expired, the Assistant Secretary would have so argued in this case. Instead, her arguments suggest that the Guidelines were still in effect at the time the Area Director issued his decision. As the official who issued the Guidelines, the Assistant Secretary is in the best position to know whether she extended their effectiveness beyond publication of the new regulations in June 1995. Because it appears that she did so extend the effectiveness of the Guidelines, the Board assumes, for purposes of this decision, that the Guidelines were still in effect on June 18, 1996, when the Area Director issued his decision.

As noted above, since June 1995, BIA's land acquisition regulations have distinguished between "On-reservation acquisitions" (section 151.10), encompassing lands "located within or contiguous to an Indian reservation," and "Off-reservation acquisitions" (section 151.11), encompassing lands "located outside of and noncontiguous to the tribe's reservation." The present acquisition clearly falls under section 151.10, rather than under section 151.11.

Unlike the present section 151.11, the Guidelines do not explicitly state that they apply only to off-reservation lands which are not contiguous to a reservation. Thus, it is conceivable that they were intended to apply to all acquisitions of off-reservation lands, including lands which are contiguous to a reservation. It is presumably under such a theory that Appellant contends here that the Guidelines apply to this acquisition.

It appears from materials presently before the Board that the Department began to classify contiguous lands with on-reservation lands, and to distinguish them from off-reservation non-contiguous lands, when the Secretary issued his July 19, 1990, memorandum entitled "Policy for Placing Lands in Trust Status for American Indians." 6/ The Secretary stated in that memorandum that lands "located either within or contiguous to the tribal reservation's exterior boundaries" would be evaluated under 25 C.F.R. § 151.10 (1990) but that, with respect to "off-reservation acquisition requests (other than lands contiguous to the reservation)", certain additional criteria would be applied. A proposed revision of section 151.10 and a proposed new section 151.11 were published on July 15, 1991, 56 Fed. Reg. 32,278, drawing the same distinction. Thus, at the time the Assistant Secretary issued her May 20, 1994, memorandum, the practice of classifying contiguous lands with on-reservation lands was well established. It appears most likely, therefore, that the Assistant Secretary did not intend to include contiguous lands within the coverage of the Guidelines.

The Board concludes that the Guidelines were not intended to, and therefore do not, apply to this acquisition request. Accordingly, the Board rejects those of Appellant's arguments which are based upon the Guidelines.

6/ A similar classification of contiguous lands appears in section 20(a) of the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2719(a), enacted in 1988.

Appellant also contends that this proposed acquisition is an acquisition for gaming purposes and that the Area Director's decision was made in violation of a September 28, 1994, memorandum issued by the Acting Deputy Commissioner of Indian Affairs and the attached "Checklist for Acquisitions for Gaming Purposes" (Checklist). 7/

The Acting Deputy Commissioner's memorandum states: "In accordance with [the Secretary's July 19, 1990, memorandum], all requests for the acquisition of land in trust for gaming purposes shall be approved/disapproved by the [BIA] Central Office." The Checklist sets out certain procedures to be followed in reviewing such acquisition requests and repeats the requirement that they be transmitted to the Central Office for approval/disapproval "regardless if the land is located on-reservation, is contiguous to a reservation, is off-reservation, or is trust, restricted or fee land." Checklist at 1.

The Assistant Secretary disputes Appellant's contention that this proposed acquisition is an acquisition for gaming purposes. She characterizes Appellant's allegations in this regard as unsupported and conclusory. Further, she states:

> By memorandum of September 26, 1995, the Area Director directed the Agency Superintendent to determine if gaming was one of the purposes for the Carrizo Lodge (now known as Mescalero Inn) land acquisition; if it was, then the Agency Superintendent was directed to work with the Tribe to prepare a trust acquisition package under the guidelines applicable to gaming and submit the package to the Central Office for its review and approval. If it was not a gaming acquisition, then the Superintendent was to work with the Tribe to prepare an acquisition package in compliance with Section 151.10. * * * The Superintendent made the necessary inquiry and the Tribe informed the Superintendent that it did not intend to use the lands for gaming purposes.

Assistant Secretary's Answer Brief at 9.

The record indicates that both the Superintendent and the Area Director were initially concerned that the property would be used for gaming purposes. Their concern evidently derived from the fact that the property had been given to the Tribe by Gaim-Ko, Inc., a company which both BIA officials apparently understood to have some gaming connection with the Tribe. 8/

7/ The copy of the Checklist submitted by Appellant is lacking pages 3 through 7.

8/ See the Superintendent's Aug. 25, 1995, memorandum ("The Agency supports the gesture [the gift of land] and [the] Tribe's Resolution request, pending review of the gaming association between the two parties") and the Area Director's Sept. 26, 1995, memorandum at 4 ("[A]lthough the Tribal Council

In May 1996, however, the Superintendent reported:

> The interested governmental agencies have expressed the opinion that they are unalterably opposed to the use of this parcel in the operation of gaming activities. The Mescalero Apache Tribe, however, has steadfastly stated its position that it does not intend to conduct such activities. Rather, it is their intention not to alter its present use.

Superintendent's May 21, 1996, Memorandum at 2. The Area Director made a similar statement in his June 18, 1996, decision at 3.

The Tribe's communications with BIA on this point were evidently oral, as no written statements from the Tribe addressing the gaming question appear in the record. Clearly, however, despite their initial concern, BIA officials were eventually persuaded that the Tribe did not intend to conduct gaming operations on the property.

The Checklist states at page 8:

> All requests for the trust acquisition of land intended for gaming purposes must be processed with [IGRA] Section 20 considerations in mind. Typically, the intended gaming purpose will be for the construction and operation of a new gaming facility. There will be projects, however, which on first impression will not readily appear to be for "gaming purposes." In these cases, if the proposed acquisition is for a project which proposes to enhance or expand an existing gaming facility, then the acquisition is for gaming purposes. For example, the tribe intends to enlarge the parking area, or expand the gaming facility through the addition of a hotel with additional gaming space.

In this appeal, Appellant contends:

> [U]nder the gaming directive of the Deputy Commissioner [in the Checklist], the Mescalero Inn appears to qualify as a gaming facility as it is adjunct to the Inn of the Mountain Gods [the Tribe's on-reservation resort], which houses Class III casino gaming. The Mescalero Inn provides parking for and a shuttle to the casino. It provides additional hotel space and restaurant facilities. Advertising is conducted jointly for the Mescalero Inn and Inn of the Mountain Gods. As has been vigorously asserted by both the tribe and the Area Director, the Mescalero Inn is under the direct control of the Inn of the Mountain Gods.

Appellant's Opening Brief at 13.

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fn. 8 (continued)
Resolution does not state this property is being acquired for gaming purposes, we understand this might be a possibility. We say this due to the language in the Resolution that this gift of land and property is being made by Mr. and Mrs. Raymond Gallegos who are the owners of Gaim-Ko, Inc.").

If Appellant's factual allegations are accurate, this acquisition could well be subject to the Checklist. The Assistant Secretary has not disputed Appellant's factual allegations. Nor has she explained why, if Appellant's allegations are accurate, this acquisition request does not fall under the Checklist as an enhancement or expansion of the Tribe's existing gaming facility. 9/

Similarly, the administrative record includes no evidence that the Superintendent or the Area Director analyzed the proposed acquisition to determine whether it was subject to the Checklist as an enhancement or expansion of an existing gaming facility. Nor is it clear from the record that the Tribe, in denying an intent to conduct gaming on the property, understood that BIA considered "gaming purposes" to include the kind of uses described in the quoted portion of the Checklist.

If this proposed acquisition is an acquisition for gaming purposes, as that term is used in the Checklist, the Area Director lacked the authority to approve it. Given the present state of the record, however, it is not possible to determine whether this acquisition falls under the Checklist.

Appellant next contends that the Area Director's analysis of this acquisition request under 25 C.F.R. § 151.10 is arbitrary, capricious, and an abuse of discretion. Appellant intertwines its argument in this regard with its argument concerning alleged violations of the Guidelines. Because it has held that the Guidelines are not applicable to this acquisition request, the Board considers Appellant's argument only insofar as it is based on the regulatory criteria.

The Area Director's decision includes a discussion of each of the criteria in section 151.10, with the exception of criterion (d), which applies only to acquisitions for individuals. The decision also addresses the concerns expressed by Appellant; Lincoln County, New Mexico; and the State of New Mexico. Appellant clearly disagrees with the Area Director's analysis under the criteria in section 151.10. Under the standard of review applicable here, however, the Board does not undertake to re-analyze or re-weigh this acquisition request under the criteria in section 151.10. Rather, the Board's task is to determine whether BIA's decision was based on a consideration of the relevant factors.

In most respects, the Area Director's decision is so based. However, in view of the possible gaming-related uses of the property discussed above, it appears that the Area Director's discussion of criterion (c) ("The purposes for which the land will be used") may be inadequate. With respect to this criterion, the Area Director's decision states:

9/ The Assistant Secretary makes no mention of the Checklist in her answer brief, even though Appellant relied on it extensively in its opening brief. Because the Assistant Secretary has not stated otherwise, the Board assumes, for purposes of this decision, that the Checklist was still in effect at the time of the Area Director's decision.

> 5. The purposes for which the land will be used:
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> This facility is situated a couple of miles north of the Tribe's existing Inn of the Mountain Gods destination resort. This land and facilities will be used in conjunction with those purposes [sic] for tribal economic development. This land has been used for commercial purposes in the past with the existing building used for lodging, meeting, socializing and restaurant purposes. The Tribe indicated there is no change in the foreseeable future from the commercial purposes for which the land is presently being utilized.
>
> The interested governmental agencies have expressed the opinion that they are opposed to the use of this parcel in the operation of gaming activities. The Tribe, however, has steadfastly stated its position that it does not intend to conduct any gaming activities on this property. Instead it is the Tribe's intention not to alter its present use. This satisfies the purpose requirement in Section 151.10(c).

Area Director's June 18, 1996, Memorandum to Superintendent, Mescalero Agency, at 2-3.

This discussion suggests that, if gaming-related uses of the property (e.g., casino parking and shuttle service) were indeed in place as alleged by Appellant, they were not taken into account by the Area Director. 10/ Possibly, the Area Director intended to encompass such activities in his general statement about the relation between the Mescalero Inn and the Inn of the Mountain Gods. However, that statement is not specific enough to inform the reader, or the Board, that the Area Director took the possible gaming relation into account.

Not addressed at all in the decision is the relationship between the Tribe and Gaim-Ko, Inc., and any possible implications this might have for the uses of the property. The fact that the property was given to the Tribe by Gaim-Ko, Inc., which apparently has a gaming relationship with the Tribe, is a relevant fact which should have been taken into account in the "purpose" analysis.

[1] In order to demonstrate that it has considered the relevant facts related to the purpose for which a proposed land acquisition will be used, BIA should include in its decision a discussion of the facts which are, or should be, within BIA's knowledge and which have some bearing on the present or future use of the property. Because it is not clear from his decision that the Area Director considered all relevant facts relating to the purpose for which the property in this case is to be used, the Area Director's decision must be vacated.

10/ Appellant alleged before BIA that a casino shuttle service was in operation at that time, i.e., prior to the Area Director's decision. See Appellant's Apr. 22, 1996, comments at 4-5.

Upon remand of this matter to him, the Area Director shall conduct a further analysis under subsection 151.10(c). In issuing a new decision, he should discuss all present uses of the property, including any uses which have developed since the time of his original decision. Further, he should include in the record for his decision a copy of the portion of the Tribe's economic development plan, or other relevant tribal document, which shows its planned future uses of the property. 11/ In addition, he should discuss the relationship between the Tribe and Gaim-Ko, Inc., and any implications he believes that relationship may have for the future uses of the property.

If, upon this further analysis, the Area Director concludes that this proposed acquisition is an acquisition for gaming purposes under the Checklist, and/or other relevant directives, he shall follow the procedures in those directives.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Area Director's June 18, 1996, decision is vacated, and this matter is remanded to him for further consideration. 12/

//original signed
Anita Vogt
Administrative Judge

I concur:

//original signed
Kathryn A. Lynn
Chief Administrative Judge

11/ The Area Director notes in his discussion of criterion (b) ("The need of the individual Indian or the tribe for additional land") that the Tribe has included the property in its economic development plans. No copy of the Tribe's plans, or of any other tribal document discussing the Tribe's planned use of the property, is included in the record for this appeal.

12/ Appellant's request for oral argument is denied.